LEGALITY OF PRICE ADVICE AS A RESALE PRICE MAINTENANCE TECHNIQUE

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The author reviews the antitrust law relating to resale price maintenance and suggests some permissible techniques for influencing resale pricing levels.

Many suppliers and manufacturers have felt compelled to make some effort to guide their distributors, wholesalers and retailers in determining resale prices. From a business standpoint, such efforts are natural and understandable. This is true because the consumer's acceptance of prices, particularly the price of branded products, has tremendous marketing significance. Pricing errors can result in substantial harm, especially at the retail level, and the dealers of the manufacturer's product may blame the manufacturer who faces the consequences of resale prices and who may or may not have any power to affect them.

A marketing technique of suggesting retail prices is widespread in this country and is especially noticeable in one form or another for most durable commodities. Color television sets, for example, will be distributed to dealers at a discount off the list price, with a higher discount for wholesalers or jobbers than for retailers. This list price is an effective communication to the resellers of the manufacturer's suggested price. By careful market research and analysis, the manufacturer can usually determine the proper pricing level for his products vis-à-vis the competition and the relationship of supply and demand. The pricing judgment of the manufacturer can be easily communicated by changing the list price. When a list price is changed, a dealer will recognize the new price his supplier thinks the consumer should be charged as well as the extent of his expected margin or gross profit.

Other types of retail price communication are available and sometimes preferred. For example, advertising by the supplier or manufacturer that informs the public of the price may effectively place a ceiling on what the dealer can charge because the customer is preconditioned to the price limits before the sale. Preticketing is an increasingly popular method of suggesting retail prices and occurs when the manufacturer clearly marks the price on the com-

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modity itself. With modern packaging methods that can prevent later alteration, such pre-ticketing may not only convey a suggested price but also establish a price ceiling. In some industries, price is not stated as a percentage of the list price, nor is it practical to pre-ticket the price on the commodity. Furthermore, advertising by the supplier usually does not include retail price advertising because of frequent price fluctuations. Such roadblocks to the popular methods of communicating a suggested price often occurs in low margin, highly competitive industries dealing in staple commodities such as food and gasoline.

Whatever the particular pattern of distribution or custom of pricing, the fact remains that suppliers and manufacturers will continue to strive to influence the price which the consumer pays. Intense competition can be expected to provide the pressures for either changing distribution patterns or at least persuading minimum price levels for consumer products. Thus out of the frustration of competition comes the urgency for price advice. This article attempts to separate lawful from unlawful methods of persuasion available to the manufacturer to influence resale pricing levels. There are many techniques available for purposes of price guidance. But how does one persuade a dealer without reaching a vertical price agreement? How far can one go in suggesting price on vertical arrangements under the federal antitrust laws? What constitutes illegal coercion of an independent dealer?

I. BASIC PRINCIPLES

A statement of applicable antitrust law is relatively simple. The governing law is section 1 of the Sherman Antitrust Act.[1] In simple language, the statute prohibits any contract, combination or conspiracy in restraint of trade. Basically, these terms are used interchangeably inasmuch as they are used to describe cooperative or concerted efforts of two or more persons. The precise application of this law to the subject of price advice, however, can indeed be hazy and confusing. This is partly due to the necessary intermixture of liberal doses of marketing economics. Perhaps the chief cause for the fuzzy nature of this area of the law is the judicial difficulty of reconciling conflicting public policy that gives a high priority to antitrust enforcement on one hand but nevertheless supports long established and respected considerations for freedom of contract and the inherent right to refuse to deal.

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[1] 15 U.S.C. § 1 (1964).

Most businessmen are aware that if two competitors agree on a selling price for their products, competition has been eliminated between them and such an agreement is a restraint of trade. Because such agreements invariably have an adverse effect on competition, they are said to constitute per se violations.[2] This means that such arrangements are illegal regardless of the reasons advanced to justify them. In such a situation, it makes no difference whether there is in fact any lessening of competition.

In addition to horizontal arrangements between competitors, prices can be fixed by vertical agreements. Thus a supplier and his purchaser for resale may agree in advance on the retail price. This type of practice is referred to in antitrust terminology as resale price maintenance. Vertical pricing arrangements fall under the same prohibition of per se illegality as do horizontal agreements.[3] The law of resale price maintenance has developed over the years to greatly expand the concept of "agreement". Tacit and implied agreements as well as those that are express can constitute restraints of trade. They also include responses to coercive conduct where the result is the same as though agreements had been entered into. In addition, there have been developed over the years essentially three exceptions to the prohibition of resale price maintenance. First, there are certain statutory exceptions. The most important of these concerns state fair trade laws and the immunity from federal antitrust laws provided by the McGuire Fair Trade Act.[4] Basically, these state laws permit a manufacturer or supplier to specify the subsequent resale price on the theory of protecting the value of the manufacturer's brand and trademark. The constitutionality of these state laws has been judicially tested with differing results.[5] Second, there is an exception where the supplier retains legal title to the commodities involved. Thus if one delivers merchandise on consignment he may have a full legal right to set the price. But United States Supreme Court decisions and the Uniform Commercial Code have considerably limited this ex-

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[2] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[3] *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

[4] 15 U.S.C. § 45 (2)-(5) (1964).

[5] The constitutionality of fair trade legislation in Ohio is now settled. Following the unsatisfactory result in Hudson Distributors, Inc. v. UpJohn Co., 174 Ohio St. 487, 190 N.E.2d 460 (1963), all doubt was removed in Olin Mathieson Chemical Corp. v. Ontario Store, Inc., 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967). For a discussion of this topic see Fisher, *Ohio Fair Trade—Fair or Foul*, 28 OHIO ST. L. J. 565 (1967).

ception.[6] Third, there is the so-called *Colgate* doctrine.[7] The *Colgate* doctrine was based on the concept that any seller should have an inherent right to select the parties with whom he will deal. A supplier's refusing to deal became one of the sanctions used to enforce resale price maintenance. But there are limits on the right of suppliers to refuse to deal, and understanding these limitations is necessary in order to find the permissible methods of giving price advice to retailers or dealers.

II. History of Resale Price Maintenance

The beginning of the legal doctrine of resale price maintenance is found in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[8] This litigation was instigated by Dr. Miles, an Indiana manufacturer, against cut-rate druggists ostensibly for the purpose of protecting "its trade sales and business" and conserving "its goodwill and reputation."[9] Dr. Miles sold its product through wholesalers by consignment contracts. The wholesaler-consignee could sell only to those resale agents specified in advance by Dr. Miles. In addition, Dr. Miles entered into agency agreements with retailers. The key provision of such agreements was as follows:

> In consideration whereof said Retail Agent agrees in no case to sell or furnish the said Proprietary Medicines to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said Retail Agent further agrees not to sell the said Proprietary Medicines at any price to Wholesale or Retail dealers not accredited agents of Dr. Miles Medical Company.[10]

The use of the designation "agency" by Dr. Miles did not purport to prohibit the passing of title to such retailers. The use of this type of contract was widespread, with some 25,000 retailers involved. The defendant was a Kentucky corporation conducting a wholesale drug business. It refused to enter into the required

[6] In Simpson v. Union Oil Co., 377 U.S. 13 (1964), the Supreme Court clearly subordinated the legal rights of consignment selling to the public policy against antitrust violation involving resale price maintenance. In addition, title retention transactions intended as purchase money security no longer have special legal significance in states which have adopted the UNIFORM COMMERCIAL CODE. *See, e.g.,* OHIO REV. CODE § 1309.02 (Page 1962) (UNIFORM COMMERCIAL CODE § 9-102) and OHIO REV. CODE § 1309.13 (Page 1962) (UNIFORM COMMERCIAL CODE § 9-202).

[7] United States v. Colgate & Co., 250 U.S. 300 (1919).

[8] 220 U.S. 373 (1911).

[9] *Id.* at 375 (quoting from complaint).

[10] *Id.* at 380.

wholesale consignment contract and had instead procured its merchandise through other Dr. Miles customers. To conceal this practice, the defendant had obliterated carton serial numbers so that plaintiff had no way to trace the merchandise sold in violation. Dr. Miles sought injunctive relief. With respect to the consignment feature, the lower court construed the agreements as an effort "to disguise the wholesale dealers in the mask of agency."[11] With respect to the retail agency agreements, the Court had no difficulty in finding an antitrust violation because "The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them."[12] The Court also stated:

> the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other.[13]

Thus the doctrine of vertical price fixing was added to the lexicon of antitrust law. Its rationale was that the resulting restraint of trade is the same with vertical price agreements as it is with horizontal ones.

In 1919, the decision in *United States v. Colgate & Co.* created some doubt as to the continuing validity of the basic principle announced in *Dr. Miles.*[14] The case involved an indictment for violation of section 1 of the Sherman Antitrust Act. A demurrer having been sustained, the United States appealed directly to the Supreme Court. The theory of the indictment was that the practices of Colgate brought about pricing uniformity and constituted an unlawful combination. Colgate used letters, telegrams, circulars

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[11] *Id.* at 395 (quoting opinion of court of appeals).

[12] *Id.* at 407.

[13] *Id.* at 408. Interestingly enough, Justice Holmes dissented, finding nothing wrong with vertical price fixing. He stated in part as follows:

> I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else . . . so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan.

Id. at 412.

and price lists to indicate to its dealers and wholesalers the prices to be charged and to declare that no sales would be made to those who did not conform. Colgate also sought and often received assurances and promises from offending dealers of future adherence to the prescribed prices. There were uniform refusals to sell to those who failed to give such assurances, with resumed sales to those who did. The Court stated:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[15]

This is the full statement of the *Colgate* doctrine. It is important to point out, however, that the Court's holding was only that an indictment not alleging existence of an agreement or contract to maintain prices fails to charge an offense under the Sherman Act. *Dr. Miles* was distinguished on the grounds that in that case "the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell."[16]

The next decision in this important line of cases was *United States v. A. Schrader's Son, Inc.*[17] This case involved the prosecution of an automobile parts manufacturer for entering into price fixing agreements with retailers, jobbers and other manufacturers who used or sold its products. As in *Colgate,* a demurrer to the indictment had been sustained in the court below. The case involved so-called licensing agreements whereby certain dealers agreed to sell the defendant's products with the further understanding that they would sell only at fixed prices. The trial court reluctantly applied the *Colgate* principle, but it argued there was no real distinction between *Dr. Miles* and *Colgate* because the *Colgate* reseller's tacit acquiescence in the prices fixed by the manufacturer was "the equivalent . . . of an express agreement . . . ."[18] Holding the trial court had misapprehended the meaning and effect of *Colgate,* the Supreme Court stressed that there was no intention to modify the doctrine of *Dr. Miles.*[19] This decision stands for the proposition

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[14] United States v. Colgate & Co., 250 U.S. 300 (1919).
[15] *Id.* at 307.
[16] *Id.* at 307-08.
[17] 252 U.S. 85 (1920).
[18] 264 F. 175, 183 (N.D. Ohio 1919).
[19] 252 U.S. 85, 99-100 (1920).

that unlawful resale price maintenance does not require the existence of a binding contract. Building on the *Dr. Miles* concept, *Schrader's Son* expands the prohibition against resale price maintenance to include contracts or agreements, whether express or implied.

The decision in *Frey & Son, Inc. v. Cudahy Packing Co.*[20] followed on the heels of *Schrader's Son.* This was a private treble-damage suit based on conspiracy under the Sherman Act involving the maintenance of resale prices between the defendant, manufacturer of "Old Dutch Cleanser," and various of its jobbers. A jury verdict was returned in favor of the plaintiff but this was reversed on appeal.[21] The appellate court concluded that under the *Colgate* doctrine the trial court should have directed a verdict for the defendant, in the absence of any written or oral agreement for the maintenance of prices. On appeal, the Supreme Court again stated that *Colgate* had been misapprehended. It pointed out that *Schrader's Son* distinctly held that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances.[22]

Less than a year after *Cudahy* was handed down, the Supreme Court decided *FTC v. Beech-Nut Packing Co.*[23] While the case was brought under section 5 of the Federal Trade Commission Act,[24] the tests of section 1 of the Sherman Act were applied since the Court held the Sherman Act provides a guide for determining what constitutes an unfair method of competition. Beech-Nut had adopted a policy of refusing to sell to wholesalers or retailers who did not adhere to its schedule of resale prices. It later supplemented this policy by refusing to sell to wholesalers who sold to retailers who did not adhere to the scheduled prices. The FTC had found substantial evidence that Beech-Nut had reinstated

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[20] 256 U.S. 208 (1921).

[21] 261 F. 65 (4th Cir. 1919).

[22] 256 U.S. 208, 210-11 (1921). While reaffirming *Schrader's Son,* the Supreme Court sustained the court of appeals reversal in *Cudahy* because the charge to the jury was held to be erroneous. The jury had been charged in part as follows:

> [If] you find defendant called this particular feature of his plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act.

Id.

[23] FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

[24] 15 U.S.C. § 45 (1952).

jobbers, wholesalers and retailers previously cut off upon the basis of assurances which satisfied Beech-Nut that such distributors would thereafter resell only at prices suggested by it. Its most effective policing control, however, was an intricate system of key numbers and symbols stamped or marked on the cases containing Beech-Nut brand products. This enabled Beech-Nut to determine the identity of the distributors from whom the products were purchased at prices below those suggested by Beech-Nut. The key number system made quick identification and cut-off possible. In addition, Beech-Nut maintained an indexing system containing the names of thousands of resellers and where appropriate included a legend such as "undesirable — price cutter" or some other expression to indicate that a particular reseller was to be blacklisted. It was an elaborate and effective system.

The court of appeals was of the opinion that there was only one difference between the price fixing condemned in *Dr. Miles* and the system of price control used by Beech-Nut. In the former there was an agreement in writing; in the latter the success or failure of the plan depended upon a tacit understanding on the part of the purchasers and prospective purchasers for resale.[25] While the court expressed its difficulty in seeing any material difference, it regarded the case governed by the *Colgate* doctrine and held the Commission had exceeded its power in making the order appealed from. The Supreme Court, however, cited both *Schrader's Son* and *Cudahy* and concluded that by these decisions it was settled law that a trader may not go beyond the exercise of the right of refusal to deal "and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."[26] The Court said the facts in *Beech-Nut* go far beyond the simple refusal to sell goods to persons who do not resell at specified prices and concluded:

> In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it . . . .
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> From this course of conduct a court may infer . . . that competition among retail distributors is practically suppressed; for all who would deal in the company's products are constrained to sell at the suggested prices . . . . Nor is the inference overcome by the conclusion stated in the Commission's findings that the merchandising conduct of the company does not constitute a

[25] Beech-Nut Packing Co. v. FTC, 264 F. 885 (2d Cir. 1920).
[26] FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922).

> contract or contracts whereby resale prices are fixed . . . . The specific facts found show suppression of the freedom of competition by methods in which the company secures the co-operation of its distributors and customers, *which are quite as effectual as agreements express or implied intended to accomplish the same purpose.*[27] [Emphasis supplied.]

Thus this case further restricts the refusal-to-deal exception. Having passed beyond express agreements of the *Dr. Miles* variety to the implied agreements as found in *Schrader's Son* and *Cudahy, Beech-Nut* did away with the necessity of basing a violation on a contractual relationship. Thirty-eight years later, Mr. Justice Brennan stated in retrospect that the majority opinion in *Beech-Nut* dispelled any confusion over whether an agreement was necessary to a finding of a Sherman Act violation, since Beech-Nut's methods were as effective as legally binding agreements in producing the prohibited result.[28]

After twenty-two years, the subject was reopened with the decision in *United States v. Bausch & Lomb Optical Co.*[29] This was a federal injunction proceeding which alleged that the defendants had restrained trade in pink-tinted lenses for eye glasses. The principal defendant was the Soft-Lite Lens Co., the sole distributor for the manufacturer, Bausch & Lomb, which produced about one-third of the pink-tinted lenses sold in 1938 through 1940. If a wholesaler continued to do business with unapproved retailers he in turn was cut off. While retail prices were apparently not specified as such under the license agreements, retailers agreed to sell the lenses at the price prevailing in the locality and at a premium over comparable untinted lenses. In affirming the judgment against Soft-Lite the Court relied extensively on *Beech-Nut*, stating that "Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial."[30] For the first time coercion was mentioned, and the phrase "to suppress the freedom of competition by coercion of its customers"[31] became a key guideline.

Any lingering doubts as to what may constitute unlawful retail price maintenance was settled in *United States v. Parke, Davis & Co.*[32] This case also involved a government suit for injunction

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[27] *Id.* at 454-55.

[28] United States v. Parke, Davis & Co., 362 U.S. 29, 41-42 (1960).

[29] 321 U.S. 707 (1944).

[30] *Id.* at 723.

[31] *Id.* at 722.

charging violations of sections 1 and 3 of the Sherman Act. The evidence established that in 1956, Parke, Davis announced a resale price maintenance policy. At that time its catalog began to indicate suggested minimum retail prices. To implement the plan, Parke, Davis informed five major wholesalers that it would refuse to sell to them unless they would refuse to deal with violating retailers. Each of these wholesalers was advised that this policy applied to the other wholesalers. A similar procedure was established at the retail level. When several retailers cut prices, they received no further sales from Parke, Davis and its wholesalers. The evidence further showed that the Parke, Davis plan was not completely successful and that price cutting with respect to its products continued. Seeking a compromise, Parke, Davis sought to persuade the offenders to stop advertising their reduced prices. The retailers agreed that they would stop advertising if the others would. This truce lasted for about a month and then one of the retailers breached this arrangement. The advertising of reduced prices started again. Instead of terminating relations with these retailers, Parke, Davis simply gave up its resale price maintenance plan.

In his opinion for the majority, Mr. Justice Brennan announced that *Colgate* did not overrule or modify *Dr. Miles.*[33] Brennan suggested that the test in cases decided before *Beech-Nut* was directed toward discovering whether the manufacturer had entered into illicit contracts, either expressed or implied, but that after *Beech-Nut,* the inquiry was directed to evaluating the coercive nature of imposing resale prices, whether or not illicit contracts were involved. This was the crux of the *Parker, Davis* case. Thus an unlawful combination arises not only from a price maintenance agreement, but,

> such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his

[32] 362 U.S. 29 (1960).

[33] *Id.* at 39.

[34] *Id.* at 43. It is correct that this conclusion points out an inconsistency and Justice Brennan recognized it as follows:

> The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal'.

Id. at 44.

mere declination to sell to a customer who will not observe his announced policy.[34]

In spite of Justice Brennan's inference to the contrary, Justice Harlan concluded in his dissenting opinion that "the Court has done no less than send to its demise the *Colgate* doctrine which has been a basic part of antitrust law concepts since it was first announced in 1919 . . . [,]"[35] and "I think that what the Court has really done here is to throw the *Colgate* doctrine into discard."[36] Harlan did not agree that *Beech-Nut* limited the scope of federal control over retail price maintenance. He argued that while an unlawful combination may arise from other than a contractural agreement, the Sherman Act does require concerted action in some form.[37] Justice Harlan agreed with the district court that Parke, Davis did not make "the enforcement of its policies, as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer."[38] His basic contention was that the Court's holding was not consistent with the district court's findings of fact. Justice Harlan felt it was more accurate to characterize Parke, Davis' resale price maintenance scheme as one that was "defensive, limited, unorganized, and unsuccessful."[39]

III. Necessity for Concerted Action

Mr. Justice Harlan's remarks about the need for concerted action are accurate. There cannot be a unilateral violation of section 1 of the Sherman Antitrust Act; that is, "concerted action" of some kind is an essential ingredient of every contract, combination or conspiracy. It might be argued that there can never be such "concert" when a dealer is coerced into following the retail price suggestions of his supplier. Indeed, coercion would seem to be in direct contradiction to any type of "agreement". The same thing, however, could be said of the case where a customer is coerced into a contractual commitment. The courts have concluded that the antitrust results are the same, and an "agreement" is present, whether express or tacit. Antitrust Chief Donald F. Turner has put it this way:

> [T]here is a restraint on alienation whether the trader abides by the manufacturer's stipulated resale price because he

[35] *Id.* at 49.
[36] *Id.* at 57.
[37] *Id.* at 52.
[38] *Id.* at 55 (quoting opinion of district court).
[39] *Id.* at 56.

> has contracted to do so, or because of the coercion of a threat to refuse to allow him to purchase any more goods for resale if he prices otherwise.
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> [S]uccessful insistence on resale price maintenance, enforced by a threat of refusal to deal, involves no serious question as to whether the concept of agreement is being stretched out of joint to cover it.[40]

Successful coercion stands as a substitute for actual "agreement" between supplier and dealer. Thus if the dealer reacts to coercion — such as a supplier's threat of refusal to continue to deal or a threat of lease cancellation — and proceeds to price at the suggested level, he has "agreed" to do so with the supplier, at least for antitrust purposes.

Just as there can be no unilateral violation of section 1 of the Sherman Act, so there is no such crime as attempting to violate this section of the Act. A clear violation is where a customer has yielded to the supplier's price under threat of unlawful pressure. The more difficult situation exists where the coercive force is unsuccessful. It does not seem possible to find even a tacit or implied "agreement" if the threat does not produce the desired result. The principle of concerted action would appear to be completely abrogated where the sought-after result is not accomplished. For example, there was a definite failure of the resale price maintenance scheme in the landmark decision of *Simpson v. Union Oil Co.*[41] A close analysis of this decision will reveal some interesting points. Note the words of Justice Douglas:

> If the 'consignment' agreement achieves resale price maintenance [which it obviously did not as far as Simpson was concerned] in violation of the Sherman Act, it and the lease are being used to injure interstate commerce . . . .[42]

Simpson claimed treble damages on the premise that he was unlawfully cut off for not complying with Union Oil Company's consignment-operated resale price maintenance scheme, specifically admitting the failure to coerce prices. Therefore, it is difficult to understand Justice Douglas' conjecture as to whether or not the consignment agreement may achieve resale price maintenance. The opinion of the Court also contained the following:

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[40] Turner, *The Definition Of Agreement Under The Sherman Act: Conscious Parallelism And Refusals To Deal,* 75 HARV. L. REV. 655, 688 (1962).

[41] 377 U.S. 13 (1964).

[42] *Id.* at 16.

> Here we have such an agreement [consignment]; it is used coercively, and, it promises to be equally if not more effective in maintaining gasoline prices than were the *Parke, Davis* techniques in fixing monopoly prices on drugs.[43]

Note the word "promises." The Court seemed to be primarily concerned with the potential evil of a consignment distribution arrangement. Probable injury to competition, however, is not a part of section 1 of the Sherman Act. Thus it is also difficult to understand the following language of the opinion.

> The evil of this resale price maintenance program . . . is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline . . . .[44]

The facts of the case suggest that the decision concerning unsuccessful refusals to deal is really predicated on grounds other than the implied or tacit "agreement" between purchasers and sellers. There are two possible explanations for the Court's decision in *Simpson*. The first of these is that there was a period of compliance and hence a period of successful resale price maintenance prior to the refusal to deal. Thus, the controlling fact for the Court was Simpson's agreement with Union Oil to maintain resale prices, at least for a period of time. When Simpson disagreed with the prices dictated by Union Oil, such price fixing was brought to an end. Perhaps the conclusion of the case was founded on this earlier, successful resale price maintenance, with the termination or failure to renew the Simpson lease admissible as a necessary basis for determining the extent of injury.

The preferred analysis, however, is that in the refusal-to-deal cases the necessary "agreement" can be found outside the purchaser-seller relationship. On this basis, the *Simpson* decision would perhaps be correct. Certainly, the "agreement" necessary for a section 1 violation of the Sherman Act need not be limited to an "agreement" between a supplier and his dealer in the immediate controversy. There is no reported court of appeals or Supreme Court decision where the plaintiff has prevailed when the conspiracy or combination element was not clearly established.[45] In refusal-to-deal cases, this element is almost always based on multilateral action. Without it, courts have been reluctant to hold for the plaintiff.

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[43] *Id.* at 17.

[44] *Id.* at 21.

[45] South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650, 654 (N.D. Ill. 1965).

Professor Turner referred to multilateral action as "vertical-horizontal conspiracy" and concluded that if the interdependence of decisions is established, recognized concepts of conscious parallelism can be applied.[46] If a supplying company makes a series of resale price agreements, this parallel behavior necessarily involves a horizontal variety of conspiracy. In such a situation, the approach to a dealer is "an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce."[47] The fact that Simpson and Union Oil Company did not successfully engage in unlawful resale price maintenance is not, therefore, decisive. Multilateral vertical price fixing was very substantial and eminently successful.

Most cases of multilateral action take the pattern of a series of "agreements" uniformly applied to competing dealers. A case in point is *Klein v. American Luggage Works, Inc.*[48] This was another situation where a coercive plan failed. The plaintiff was a discounter who had been promised an exclusive dealership in Delaware. The defendant, American, habitually specified resale prices by preticketing the merchandise. The evidence showed that failure to adhere to preticketed prices usually resulted in termination of supply. The evidence also showed that American's policing of Klein was a result of complaints about Klein's price cutting from two large department stores, Wannamaker and Strawbridge, who complied with the established prices with the knowledge that American's scheme required retail adherence and carried a refusal-to-deal sanction. Thus the "agreement" and conspiracy were present, and this was sufficient to find a violation. On appeal, the decision was reversed and remanded with a holding that the proof was insufficient to establish acquiescence by Wannamaker and Strawbridge to the coercive pressures of the supplier.[49] The court of

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[46] Turner, *supra* note 40, at 695. It should be pointed out that Professor Turner took issue with what he characterized a "free-wheeling approach to vertical-horizontal conspiracy" and suggested the need for a rule which would avoid its automatic application. He summarized his position in the following language:

> Conscious parallel decisions by competitors which are induced by the demand of a buyer from or seller to the group, and which are not interdependent, should not be held to constitute a horizontal agreement or participation in a vertical-horizontal conspiracy.

Id. at 706.

[47] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939).

[48] 206 F. Supp. 924 (D. Del. 1962).

[49] Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963).

appeals pointed out that the crucial question was whether the pricing behavior of Wannamaker and Strawbridge stemmed from independent decisions or from an "agreement", tacit or express. The court of appeals was satisfied that Wannamaker and Strawbridge would have selected the preticketed prices on their own volition.[50] Hence, the decision was not based on American's threatening of Klein but instead on whether two other customers had entered into a price fixing agreement. If actual agreement between American and these two large customers could have been shown, Klein would have prevailed. Note that the necessary "agreement" does not have to be between a supplier and complaining dealer. It can be between a supplier and some of his other dealers or a supplier and one or more of his competing suppliers.

A variation of the pattern is illustrated by the case of *Girardi v. Gates Rubber Co. Sales Div., Inc.*[51] Defendant Gates manufactured belts and pulleys used in power machinery. Girardi was a distributor for Gates. Price lists were furnished to all distributors, and Girardi followed the suggested prices until January, 1954. He then increased his cash discount. The Gates representative confronted Girardi and threatened cancellation.[52] When Girardi refused to mend his ways, cancellation followed. A resale price maintenance scheme had again failed. The allegations of conspiracy with respect to the other distributors were dismissed on defendant's motion. Gates relied entirely on *Colgate.*[53] Internal management letters were used to establish the complaints made by other distributors with respect to Girardi's practices. The court held the lower court's dismissal of the conspiracy allegations to be error. It concluded that if Gates did agree with any distributor to cut off Girardi and thereafter did so, this was sufficient to cause a violation of section 1.[54]

In a recent case a service station operator under lease from the defendant Mobil Oil Company brought a treble damage action, claiming resale price maintenance in violation of the Sherman Act and a tying agreement in violation of the Clayton Act.[55] The leasing agreement between these parties disclaimed any power of control by Mobil over the plaintiff's manner of doing business. The plaintiff stated that defendant's general sales representative insisted he

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[50] *Id.* at 791.
[51] 325 F.2d 196 (9th Cir. 1963).
[52] *Id.* at 198.
[53] *Id.*
[54] *Id.* at 200, 204.
[55] Broussard v. Socony Mobil Oil Co., 350 F.2d 346 (5th Cir. 1965).

reduce his retail price for gasoline by two cents per gallon. After once complying with this demand, the plaintiff refused to continue to bind himself to the prices suggested. This is another case where alleged coercive methods failed. Thereafter the plaintiff's lease was not renewed. Mobil asserted that its price advice was only a suggestion for the purpose of encouraging competition.[56] Among other things, the court held that fixing a maximum resale price constitutes the same per se evil as fixing a minimum resale price.[57] Thus resale price maintenance can mean maintaining low prices as well as maintaining high prices. Mobil's representative may have engaged in some kind of multilateral concerted action by insisting on identical treatment for all dealers with respect to the requested price reduction. The court characterized Mobil's plan as a combination, presumably on the basis that it applied across the board to all dealers.

In spite of this decision, it is difficult to find a basis for a section 1 Sherman Act violation if no conspiracy or combination can be found to exist. The "going beyond" doctrine as formulated in *Parke, Davis* fails in this respect. A good illustration is found in the case of *South End Oil Co. v. Texaco, Inc.*[58] In that case no concerted action was established. In other words, no other Texaco distributors or dealers were involved. Texaco never sought or achieved any price-fixing agreement, and the plaintiff was never asked to agree nor did he agree with anyone as to prices. The court stated:

> Since no agreement is alleged, the claimed violation of §1 must arise from acts which the plaintiff believes amount to 'unlawful conduct'. Unlawful conduct, however, is nothing more than a substitute for an 'express' agreement. It does not eliminate the requirement of showing that a combination in fact exists . . . . We are not aware of any case in which a finding of 'unlawful conduct' rests on the isolated experiences of one businessman. [All that the record shows is that] various Texaco salesmen and executives advised plaintiff *inter alia* that he was 'selling in the wrong channels' and at the wrong prices and that Texaco was not pleased to find that its motor oils were being widely advertised at discount prices.[59]

The court concluded that this kind of price advice did not violate the antitrust laws.

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[56] *Id.* at 349.
[57] Kiefer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951).
[58] 237 F. Supp. 650 (N.D. Ill. 1965).
[59] *Id.* at 653-54.

More recently, in another petroleum industry case, another court found as a matter of law that unsuccessful pricing suggestions were outside the antitrust prohibitions. This was the case of *Quinn v. Mobil Oil Co.*[60] Coercive attempts with respect to resale prices were unsuccessful. The plaintiff claimed that Mobil began a campaign of harrassment by delaying deliveries of its products, shipping unordered merchandise and the like. The specific finding of the court was that the complaint was fatally defective because it failed to allege the existence of any contract, combination or conspiracy between the defendant and others fixing the resale price of gasoline. All the court found was a "unilateral attempt to coerce plaintiff into making such an agreement," and this does not violate section 1.[61] Both *Simpson* and *Broussard* were distinguished, generally along the lines that have been discussed. The concurring opinion in the *Quinn* case held that section 1 of the Sherman Act is not violated by a maximum resale price maintenance arrangement between a single supplier and a single dealer.[62] Reliance on this position, however, would be little more than wishful thinking by a manufacturer or supplier.

IV. The Practical Effect of The Colgate Doctrine

Whether or not the Supreme Court has eviscerated the *Colgate* doctrine remains to be seen. As a practical matter, it may make little difference because businessmen would not want to irrevocably terminate relations with a price-cutter. No one wants to use the bare-bones *Colgate* theory in the absence of customer rehabilitation possibilities. As has been pointed out, in the area of resale price maintenance, methods which are as effective as agreement and which accomplish the same purpose are prohibited. The *Colgate* doctrine is dead because it is unrealistic in any business sense. Unilateral announcement of a policy not to sell to a dealer who fails to adhere to designated resale prices coupled with a unilateral cut off would apply only in a vacuum. Collateral factors are invariably present. The refusal-to-deal exception may be unavailable because another supplier or another customer insists that something be done about the price cutter who is upsetting the market. In such a case, refusal to deal is a result of collateral conspiracy or concerted action and thus is unlawful. On the other hand, a resale price

[60] 375 F.2d 273 (1st Cir. 1967).

[61] *Id.* at 275.

[62] *Id.* at 276.

maintenance program may be conditioned on the acquiescence of other purchasers, in which case the unilateral aspects are shoved aside. Indeed, the acquiescence of all purchasers in the same trading area is a prerequisite to effective stabilization of the market. A dealer wants assurance that competing resellers are also required to maintain the prescribed prices.[63]

From a business viewpoint, no seller wants to discontinue his sales to a customer. What the businessman wants is to maximize his persuasive influence in the area of pricing standards and at the same time continue to maintain his sales relationship. Even after a customer is cut off in strict adherence to the limitations of the *Colgate* doctrine, it would be a poor business decision if word of that action did not reach other purchasers in similar circumstances. The value of a termination is the potential deterrent effect. For the deterrent to be effective, the other purchasers must, of course, realize the threat.

V. Price Advice Guidelines

In conclusion, the cases which have been discussed suggest approaches to be employed by the manufacturer or supplier if he is to avoid antitrust involvement. From an examination of this body of judicial sifting and interpretation, it is possible to create several guidelines to guard against stepping over the line into the area of unlawful resale price maintenance. Clearly, a supplier or manufacturer may talk to his dealers and give advice covering a large range of merchandising subjects. In doing this, it is possible to avoid retail price fixing.

First, the supplier should never seek assurances of future compliance from his dealers. In suggesting a particular price or pricing policy, meticulous care must be exercised to avoid consent or promise. Any situation from which such consent can be inferred is subject to attack as a vertical price conspiracy, combination or agreement, and illegal per se. There is usually a tendency in a sales representative towards certainty. It seems that the typical rhetorical questions should be avoided under all circumstances. These are

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[63] United States v. Parke, Davis & Co., 362 U.S. 29, 46 (1960). This idea was admitted by Justice Brennan as being the crux of refusals to deal with respect to price behavior and conformance:

> It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also.

Id.

simply exercises in antitrust brinkmanship. Examples are: "You will cooperate, won't you?" or "Don't you think I am right?" In the final analysis, there is a simple test which can be applied. The sales representative must come away from a price advice meeting without a feeling of assurance that the dealer will comply.

Second, it is necessary for the supplier or manufacturer to avoid a price advice scheme which involves common participation of competing dealers. Where the law permits vertical price advice, it does so only on an individual basis. Therefore, the supplier must avoid such a plan or scheme. The reciprocal features of any resale price maintenance program appear to be most insidious. It is clear from the cases that a dealer should never be induced towards particular pricing behavior because a fellow-dealer has already agreed to similar conduct. The result of an agreement to maintain a particular price or merchandise plan conditioned on the compliance of the other dealers in the area to do the same is often a quick trip to the courthouse. Common participation provides the lessening of competition that accompanies any horizontal price arrangement.

Third, it is important that the supplier or manufacturer never respond to another dealer's price complaint. Price advice is often generated by a strong customer demanding that something be done about the price-cutting tactics of a competing dealer. The law of resale price maintenance is particularly sensitive to motive. No price advice should be given to a dealer which does not originate with his supplier. Thus the motivation must always be on the basis of the supplier's own evaluation of market conditions. If price advice can be traced to a competing dealer, the supplier's suggestion can amount to a violation of antitrust law.

Fourth, threats of any kind against a dealer should be avoided. Sales representatives should be charged with the responsibility of knowing their dealers. Obviously, quantitive coercion is impossible of measurement. Different dealers may have vastly different thresholds of pain. One dealer may be so afraid of displeasing his supplier that he sees disaster behind every visit from a sales representative; another dealer may be so independent that nothing can coerce him. Furthermore, there are collateral conditions which can promote illegal coercion. For example, if the dealer has a lease or supply agreement which is about to expire, a finding of coercion is more likely. In any event, care must be utilized to avoid the subtle or veiled threat.

Under the antitrust laws today, dealers can be lawfully persuaded to maintain a suggested pricing standard. The law has changed dramatically since *Colgate* first espoused the doctrine of refusal-to-deal and the right of the trader to "announce in advance the circumstances under which he will refuse to sell."[64] To cut off a dealer under present *Colgate* limitations would be a futile business decision unless other purchasers in similar circumstances learn to such action and are deterred. Nevertheless, all is not lost. Price advice can still be an effective merchandising tool and if care is taken can be employed without violating federal antitrust laws.

[64] United States v. Colgate & Co., 250 U.S. 300 (1919).